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American Jurisprudence, Second Edition | May 2021 Update

Federal Tort Claims Act

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VII. Actions Under Federal Tort Claims Act

E. Procedure in Federal District Court Actions

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35A Am. Jur. 2d Federal Tort Claims Act § 185

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Federal Tort Claims Act

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VII. Actions Under Federal Tort Claims Act

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1. Jurisdiction

a. In General

§ 185. Jurisdiction of federal district court in federal tort claim action, generally

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[Federal Procedural Forms § 63:39 \(Jurisdiction\)](#)

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Under the Federal Tort Claims Act (FTCA), the United States district courts, including the United States district court for the District of the Canal Zone and the district court of the Virgin Islands, have exclusive jurisdiction of civil actions on claims against the United States for money damages for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of its office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.¹ The FTCA confers jurisdiction to the federal district courts over claims for which injury occurred after January 1, 1945, regardless of when the tortious act or omission complained of occurred.²

The burden is on a party asserting jurisdiction under FTCA to demonstrate that the claim asserted is the kind permitted by statute and that the conduct giving rise to the action occurred within the scope of the government employee's employment.³

The FTCA itself is the source of the federal courts' jurisdiction to hear tort claims made against the government that meet statutory criteria, and jurisdiction, if it exists, does not come from a general grant of federal question jurisdiction.⁴ The FTCA

does not provide a jurisdictional foundation for an action against the United States based on the acts of a person who is not a federal government employee,⁵ such as an independent contractor.⁶

Although the governing statute does not generally provide district court jurisdiction over a claim alleging either a wrongful taking of property,⁷ or a violation of a contractual right,⁸ jurisdiction under the FTCA is not barred merely because the relationship between the parties was originally defined by contract, and the negligent performance of a contract can give rise to tort liability under the FTCA.⁹ Furthermore, jurisdiction is not denied a plaintiff who brings a case in tort merely because the plaintiff could equally well sue for a breach of contract.¹⁰ Similarly, while the FTCA does not authorize suit against the federal government on claims based on strict liability,¹¹ a conversion claim brought against the government under the FTCA will not be dismissed, since conversion requires proof of wrongful conduct or intent.¹²

Practice Tip:

Not only is the Federal Tort Claims Act (FTCA) a federal cause of action, it presents a federal question that can only be brought in federal court.¹³ An action under the FTCA cannot be maintained in state court.¹⁴

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Footnotes

¹ 28 U.S.C.A. § 1346(b)(1).

² W.C. & A.N. Miller Companies v. U.S., 963 F. Supp. 1231 (D.D.C. 1997).

³ Tabman v. F.B.I., 718 F. Supp. 2d 98 (D.D.C. 2010).

⁴ CNA v. U.S., 535 F.3d 132 (3d Cir. 2008), as amended on other grounds, (Sept. 29, 2008).

⁵ Brandes v. U.S., 783 F.2d 895 (9th Cir. 1986); Rheams v. Bankston, Wright & Greenhill, 756 F. Supp. 1004 (W.D. Tex. 1991).

⁶ Moreno v. U.S., 965 F. Supp. 521 (S.D. N.Y. 1997); Bethae v. U.S., 465 F. Supp. 2d 575 (D.S.C. 2006).

⁷ Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081 (6th Cir. 1978).

⁸ Johnson v. Secretary of and U.S. Dept. of Housing and Urban Development, Federal Housing Admin., 710 F.2d 1130 (5th Cir. 1983); Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081 (6th Cir. 1978); Tannenbaum v. Envirodyne Engineers, Inc., 609 F. Supp. 931 (N.D. Ill. 1985); Karlen v. U.S., 727 F. Supp. 544 (D.S.D. 1989).

⁹ Green Const. Co. v. Williams Form Engineering Corp., 506 F. Supp. 173 (W.D. Mich. 1980).

¹⁰ Aleutco Corp. v. U.S., 244 F.2d 674 (3d Cir. 1957); Palomo v. U.S., 188 F. Supp. 633 (D. Guam 1960).

¹¹ Laird v. Nelms, 406 U.S. 797, 92 S. Ct. 1899, 32 L. Ed. 2d 499 (1972); Russell v. U.S., 626 F. Supp. 1217 (S.D. Ind. 1986); Western Nat. Mut. Ins. Co. v. U.S., 964 F. Supp. 295 (D. Minn. 1997).

¹² Nottingham, Ltd. v. U.S., 741 F. Supp. 1447 (C.D. Cal. 1990).

¹³ Gordo-Gonzalez v. United States, 873 F.3d 32 (1st Cir. 2017); Williams v. Board of Regents of University of New Mexico, 990 F. Supp. 2d 1121 (D.N.M. 2014).

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[Oeschger v. Fitzgerald, 2 Mass. App. Ct. 472, 314 N.E.2d 444 \(1974\).](#)

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1. Jurisdiction

a. In General

§ 186. Jurisdiction of federal district court in federal tort claim action based on counterclaim by or against United States

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Jurisdiction of the United States district courts under the Federal Tort Claims Act (FTCA) includes jurisdiction of any setoff, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under the FTCA.¹ If the United States files a tort action against a defendant to recover damages, the defendant may file a counterclaim under the FTCA for any tort claim arising out of the same occurrence.²

A number of courts take the view that a counterclaim filed under the FTCA in an action brought by the United States against the defendant is barred if it is filed after the limitations period has run, even though the counterclaim arises out of the same transaction or occurrence which is the subject matter of the government's claim against the defendant.³ In some courts, however, if the United States waits until the limitations period has expired and then brings an action for damages, it impliedly waives the right to assert the statute of limitations against a defendant interposing a counterclaim arising out of the same transaction or occurrence that is the subject matter of the government's claim against the defendant.⁴ In such circumstances, the United States submits itself to the jurisdiction of the court for the determination of all issues which might arise from the accident between the parties involved.⁵

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Footnotes

¹ [28 U.S.C.A. § 1346\(c\)](#).

² [U.S. v. Springfield](#), 276 F.2d 798 (5th Cir. 1960); [U.S. v. Rosati](#), 97 F. Supp. 747 (D.N.J. 1951).

³ [Newberg v. Federal Sav. & Loan Ins. Corp.](#), 317 F. Supp. 1104 (N.D. Ill. 1970); [U.S. v. Thrower](#), 267 F. Supp. 608 (M.D. Tenn. 1967); [U.S. v. Carson](#), 360 F. Supp. 842 (S.D. Tex. 1973); [U.S. v. Thurber](#), 376 F. Supp. 670 (D. Vt. 1974).

⁴ [U.S. v. Southern Cal. Edison Co.](#), 229 F. Supp. 268 (S.D. Cal. 1964).

⁵ [Casias v. U.S.](#), 532 F.2d 1339 (10th Cir. 1976); [U.S. v. Capital Transit Co.](#), 108 F. Supp. 348 (D. D.C. 1952).

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§ 187. Jurisdiction of federal district court in federal tort claim action for contribution

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Jurisdiction of the United States district courts under the Federal Tort Claims Act includes jurisdiction of a claim of a joint tortfeasor, who has been sued with the United States, for contribution due from the government.¹ A district court, however, will not have jurisdiction over a contribution claim against the government if the joint tortfeasor is unable to establish that the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.²

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¹ [U.S. v. Yellow Cab Co.](#), 340 U.S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951).

² [Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York](#), 278 F. Supp. 2d 313 (N.D. N.Y. 2003).

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§ 188. Effect of statute of limitations on jurisdiction of federal district court in federal tort claim action

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[Accrual of cause of action for purpose of statute of limitations in medical malpractice actions under Federal Tort Claims Act—post-Kubrick cases, 101 A.L.R. Fed. 27](#)

Forms

[Federal Procedural Forms § 63:42 \(Limitation on amount of claim\)](#)
[Federal Procedural Forms § 63:43 \(Time limitations\)](#)

A tort claim against the United States, under the Federal Tort Claims Act (FTCA), is forever barred unless it is presented in writing to the appropriate federal agency within two years after it accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.¹ The FTCA's limitations provision does not provide two different ways of satisfying the limitations requirement, but rather signals two different ways to file a claim late.² The FTCA's limitations period requires a claimant both to file an

administrative claim within two years of accrual, and to file suit within six months of denial of the administrative claim.³

The administrative-exhaustion requirement in the Federal Tort Claims Act (FTCA),⁴ and its statute of limitations, act as chronological bookends to an FTCA claim, marking both a date before which a claim may not be filed and a date after which any filing is untimely.⁵ However, the Federal Torts Claims Act (FTCA) deadline for exhausting remedies is not jurisdictional.⁶ Rather, the deadline for exhausting remedies is best viewed as a claim processing rule which is a rule that seeks to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.⁷ As such, it is subject to equitable doctrines such as tolling⁸ provided, however, that state law allows for such tolling.⁹

The general provisions of the Federal Rules of Civil Procedure pertaining to computation of time apply to the limitations period under the FTCA.¹⁰

Practice Tip:

The general rule under the FTCA is that a tort action accrues at the time of a plaintiff's injury.¹¹ A discovery rule exception, however, governs claim accrual under those circumstances in which the fact or cause of an injury is unknown to, and perhaps unknowable by, a plaintiff for some time after the injury occurs,¹² such as in medical malpractice cases,¹³ and in such cases, the claim accrues when the plaintiff discovers, or should reasonably have discovered, the factual basis for the cause of action.¹⁴ Mere knowledge of the injury is not enough, rather, a plaintiff also must understand the causal connection between the government and the injury.¹⁵

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Footnotes

¹ 28 U.S.C.A. § 2401(b).

As to notice of final denial of a claim by an agency, see § 183.

² Ellison v. U.S., 531 F.3d 359 (6th Cir. 2008).

³ Ramming v. U.S., 281 F.3d 158 (5th Cir. 2001); S.R. v. U.S., 555 F. Supp. 2d 1350 (S.D. Fla. 2008), subsequent determination, 2008 WL 4826090 (S.D. Fla. 2008).

⁴ §§ 157 to 184.

⁵ Barnes v. U.S., 776 F.3d 1134 (10th Cir. 2015).

⁶ Arteaga v. U.S., 711 F.3d 828 (7th Cir. 2013); Kwai Fun Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013), aff'd and remanded, 575 U.S. 402, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015).

⁷ Kwai Fun Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013), aff'd and remanded, 575 U.S. 402, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015).

⁸ Gallardo v. U.S., 755 F.3d 860 (9th Cir. 2014); Kwai Fun Wong v. Beebe, 732 F.3d 1030 (9th Cir. 2013), aff'd and remanded, 575 U.S. 402, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015).

⁹ Booth v. United States, 914 F.3d 1199 (9th Cir. 2019).

¹⁰ Hart v. U.S., 817 F.2d 78, 7 Fed. R. Serv. 3d 950 (9th Cir. 1987), referring to Fed. R. Civ. P. 6.

¹¹ Johnson v. U.S., 460 F.3d 616 (5th Cir. 2006); Wilson ex rel. Wilson v. Gunn, 403 F.3d 524 (8th Cir. 2005); Cannon v. U.S., 338 F.3d 1183 (10th Cir. 2003).

¹² Rakes v. U.S., 442 F.3d 7 (1st Cir. 2006).

¹³ Miller v. Philadelphia Geriatric Center, 463 F.3d 266 (3d Cir. 2006); Motley v. U.S., 295 F.3d 820 (8th Cir. 2002).

¹⁴ Donahue v. U.S., 634 F.3d 615 (1st Cir. 2011); Ramirez-Carbo v. U.S., 496 F.3d 41 (1st Cir. 2007); Bradley v. National Collegiate Athletic Association, 249 F. Supp. 3d 149, 347 Ed. Law Rep. 312 (D.D.C. 2017).

¹⁵ Donahue v. U.S., 634 F.3d 615 (1st Cir. 2011).

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§ 189. Effect of federal rules on jurisdiction of federal district court in federal tort claim action

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Jurisdiction under the Federal Tort Claims Act is unaffected by the Federal Rules of Civil Procedure, which prescribe the methods by which jurisdiction is to be exercised but do not enlarge jurisdiction.¹

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Footnotes

¹ [Donovan v. McKenna](#), 80 F. Supp. 690 (D. Mass. 1948).
As to a suit under the Federal Tort Claims Act being barred when another federal statute provides a remedy, see [§ 194](#).

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§ 190. Jurisdiction in federal tort claim action after joinder of action against individual defendant with action against United States

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West's Key Number Digest

West's Key Number Digest, [United States](#) 965, 967

Forms

[Federal Procedural Forms § 63:49](#) (Third-party practice; joinder; counterclaims and cross-claims)

The Federal Tort Claims Act does not bar joinder of an action against the United States under the Act with an action against an individual defendant,¹ if joinder does not destroy the jurisdiction of the court,² and there is subject matter jurisdiction over the action against the individual defendant.³

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Footnotes

¹ [Anderson v. U.S.](#), 118 F. Supp. 498 (W.D. Ky. 1953); [Englehardt v. U.S.](#), 69 F. Supp. 451 (D. Md. 1947).

² [Jacobs v. U.S.](#), 367 F. Supp. 1275 (D. Ariz. 1973).

³ [Morris v. U.S.](#), 521 F.2d 872 (9th Cir. 1975); [Bullock v. US](#), 72 F. Supp. 445 (D.N.J. 1947).

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§ 191. Supplemental and pendent jurisdiction of federal district court in federal tort claim action

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The federal district court may exercise supplemental jurisdiction over claims brought against the United States and other defendants, under the Federal Tort Claims Act (FTCA) and state law, where the claims originate from a common nucleus of operative facts, and splitting the claims would do nothing to promote judicial efficiency or the interests of justice.¹ Where the requirements of the governing statute pertaining to supplemental jurisdiction² are met, federal tort claim defendants will not be dismissed for lack of subject matter jurisdiction, even though they are nondiverse parties, under the doctrine of supplemental jurisdiction.³

If an action against the government, under the FTCA, is dismissed for lack of subject matter jurisdiction, the federal district court is stripped of its original jurisdiction and lacks supplemental jurisdiction as to pendent claims under state law against the other defendants in the action.⁴

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Footnotes

¹ [Rivera Carrion v. U.S.](#), 634 F. Supp. 2d 217 (D.P.R. 2009).

² 28 U.S.C.A. § 1367.

³ [Hollman v. U.S.](#), 783 F. Supp. 221 (M.D. Pa. 1992); [Figueroa Zambrana v. U.S.](#), 799 F. Supp. 6 (D.P.R. 1992).

⁴ [Estate of Harshman v. Jackson Hole Mountain Resort Corp.](#), 379 F.3d 1161 (10th Cir. 2004).

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[What constitutes “claim arising in a foreign country” under 28 U.S.C.A. s 2680\(k\), excluding such claims from Federal Tort Claims Act, 158 A.L.R. Fed. 137](#)

[Applicability of 28 U.S.C.A. sec. 2680 \(a\) and 2680 \(h\) to Federal Tort Claims Act liability arising out of government informant’s conduct, 85 A.L.R. Fed. 848](#)

The waiver of the federal government's immunity under the Federal Tort Claims Act (FTCA) is limited by the terms of the Act's exceptions, and if a claim falls within any exception to the FTCA, sovereign immunity has not been waived¹ and the United States district court is without jurisdiction to hear the case.² The FTCA, pursuant to its own terms, does not apply to—any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved is abused.³

— any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter,⁴ although the negligent transmission of postal matters does not go beyond negligence in causing the mail to be lost or to arrive late, in damaged condition, or at the wrong address,⁵ and therefore a claim of a postal customer alleging an injury as a result of tripping over mail negligently left at his or her residence by a postal carrier,⁶ or one arising out of a postal employee's opening of a

customer's package and discussion of its contents in a demeaning manner,⁷ is not precluded.

- any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.⁸
- any claim for which a remedy is provided by the law relating to claims or suits in admiralty against the United States,⁹ or in other words, any claim where admiralty jurisdiction exists.¹⁰
- any claim arising out of an act or omission of any employee of the government in administering the provisions of the Trading with the Enemy Act.¹¹
- any claim for damages caused by the imposition or establishment of a quarantine by the United States.¹²
- any claim arising out of certain excepted intentional torts.¹³
- any claim for damages caused by the fiscal operations of the Department of the Treasury or by the regulation of the monetary system.¹⁴
- any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,¹⁵ or during certain combat activities without a formal declaration of war.¹⁶
- any claim arising in a foreign country¹⁷ (including countries without a recognized government),¹⁸ (such as Antarctica),¹⁹ regardless of where the tortious act or omission giving rise to the injury suffered in the foreign country occurred.²⁰
- any claim arising from the activities of the Tennessee Valley Authority.²¹
- any claim arising from the activities of the Panama Canal Company.²²
- any claim arising from the activities of a federal land bank, a federal intermediate credit bank, or a bank for cooperatives.²³

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Footnotes

¹ *Industria Panificadora, S.A. v. U.S.*, 763 F. Supp. 1154 (D.D.C. 1991), order aff'd, 957 F.2d 886 (D.C. Cir. 1992).

² *Industria Panificadora, S.A. v. U.S.*, 763 F. Supp. 1154 (D.D.C. 1991), order aff'd, 957 F.2d 886 (D.C. Cir. 1992); *Lippman v. City of Miami*, 622 F. Supp. 2d 1337 (S.D. Fla. 2008).

³ 28 U.S.C.A. § 2680(a).

As to discretionary functions, generally, see § 193.

⁴ 28 U.S.C.A. § 2680(b).

⁵ *Dolan v. U.S. Postal Service*, 546 U.S. 481, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006).

⁶ *Dolan v. U.S. Postal Service*, 546 U.S. 481, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006).

⁷ *Honeycutt v. U.S.*, 622 F. Supp. 2d 350 (S.D. W. Va. 2008).

⁸ § 79.

⁹ 28 U.S.C.A. § 2680(d), referring to 46 U.S.C.A. §§ 30901 to 30918 (Suits in Admiralty Act) and 46 U.S.C.A. §§ 31101 to 31113 (Public Vessels Act).

¹⁰ *Anderson v. U.S.*, 317 F.3d 1235 (11th Cir. 2003).

¹¹ 28 U.S.C.A. § 2680(e).

As to the Trading with the Enemy Act, generally, see Am. Jur. 2d, War §§ 64, 65.

¹² 28 U.S.C.A. § 2680(f).

¹³ § 196.

¹⁴ 28 U.S.C.A. § 2680(i).

¹⁵ 28 U.S.C.A. § 2680(j).

As to the preclusion of claims for injuries to military personnel when the injuries arise out of or are in the course of activity incident to service, see § 195.

16 [Minns v. U.S.](#), 974 F. Supp. 500 (D. Md. 1997), aff'd, 155 F.3d 445, 170 A.L.R. Fed. 713 (4th Cir. 1998) (rejected on other grounds by, [Ortiz v. U.S. ex rel. Evans Army Community Hosp.](#), 786 F.3d 817 (10th Cir. 2015)) (Persian Gulf War).

17 [28 U.S.C.A. § 2680\(k\)](#).

18 [Parrish v. U.S.](#), 425 F. Supp. 2d 1283 (M.D. Fla. 2006).

19 [Smith v. U.S.](#), 507 U.S. 197, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993).

20 [Sosa v. Alvarez-Machain](#), 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004).

21 [28 U.S.C.A. § 2680\(l\)](#).

22 [28 U.S.C.A. § 2680\(m\)](#).

23 [28 U.S.C.A. § 2680\(n\)](#).

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[Claims Arising from Conduct of Governmental Employee in Administering or Failing to Administer Medical Care as Within Discretionary Function](#) [Exception of Federal Tort Claims Act \(28 U.S.C.A. s2680\(a\)\)](#), 172 A.L.R. Fed. 407

[Liability of United States for Failure to Warn Local Police or Individuals of Discharge, Release, or Escape of Person Who is Deemed Dangerous to Public as Affected by "Discretionary Act or Duty"](#) [Exception to Federal Tort Claims Act](#), 171 A.L.R. Fed. 655

[Liability of United States for Failure to Warn of Danger or Hazard Resulting from Governmental Act or Omission as Affected by "Discretionary Function or Duty"](#) [Exception to Federal Tort Claims Act \(28 U.S.C.A. s2680\(a\)\)](#), 170 A.L.R. Fed. 365

[Liability of United States for Failure to Warn of Danger or Hazard not Directly Created by Act or Omission of Federal Government and not in National Parks as Affected by "Discretionary Function or Duty"](#) [Exception to Federal Tort Claims Act](#), 169 A.L.R. Fed. 421

[Claims Arising from Governmental Conduct Causing Damage to Plaintiff's Real Property as within Discretionary Function](#) [Exception of Federal Tort Claims Act \(28 U.S.C.A.s2680\(a\)\)](#), 167 A.L.R. Fed. 1

[Claims based on construction and maintenance of public property as within provision of 28 U.S.C.A. sec. 2680\(a\) excepting from Federal Tort Claims Act claims involving "discretionary function or duty"](#), 37 A.L.R. Fed. 537

[Claims based on law enforcement and regulatory activities as within 28 U.S.C.A. sec. 2680\(a\) excepting from Federal](#)

Tort Claims Act claims involving “discretionary function or duty”, 36 A.L.R. Fed. 240

The Federal Tort Claims Act (FTCA) does not apply to any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved is abused,¹ even if the action complained of consists of enforcing in a discretionary manner regulations which are mandatory in character.² Plaintiffs bear the burden of showing that the discretionary function exception to the FTCA waiver of sovereign immunity does not apply.³ If the discretionary function exception applies to challenged governmental conduct, a federal district court lacks subject matter jurisdiction to hear the suit,⁴ and must dismiss it,⁵ even though the discretion may have been exercised negligently.⁶ It acts as a jurisdictional bar rather than an affirmative defense.⁷

Court uses a two-part test to determine whether government officials’ actions fall within the discretionary function exception to the Federal Tort Claims Acts (FTCA) waiver of sovereign immunity, and the plaintiff has the burden of establishing that the test is not satisfied; first, the relevant employees conduct must be a matter of choice, and second, the choice or judgment must be of the kind that the discretionary function exception was designed to shield.⁸

While exceptions to the Federal Tort Claims Act (FTCA) are to be narrowly construed, the discretionary function exception to the waiver of sovereign immunity in the FTCA poses a jurisdictional prerequisite to suit, which a plaintiff must ultimately meet as part of its overall burden to establish subject matter jurisdiction, preceding any negligence analysis.⁹

If a federal statute, regulation, or policy specifically prescribes a course of action for a government employee to follow, the discretionary function exception to the FTCA does not apply.¹⁰

When determining whether the discretionary function exception precludes federal government’s liability for tort claims under the FTCA, a court first must identify the conduct that is alleged to have caused the harm, then determine whether that conduct can fairly be described as discretionary, and if so, decide whether the exercise or nonexercise of the granted discretion is actually or potentially influenced by policy considerations.¹¹ The discretionary function exception covers only acts which involve an element of judgment or choice,¹² grounded in social, economic, political, and public policy,¹³ and involve the formulation, as opposed to the execution, of policy.¹⁴

The discretionary function exception has been held to preclude actions against the United States based on—
— decisions regarding security at an embassy and warnings of possible threats prior to a terrorist bombing.¹⁵
— Securities and Exchange Commission’s decisions of whether and how to conduct investigations and enforcement actions to prevent and discover Ponzi schemes.¹⁶
— decisions of the Veterans Administration in hiring, retaining, entrusting, training, and supervising employees.¹⁷
— the dredging activities of the Army Corps of Engineers, which allegedly resulted in an increased channel current and erosion.¹⁸
— a national park’s decision not to post warning signs about diving and not to mark certain park water hazards.¹⁹
— the placement of mailboxes by the United States Postal Service along a highway, which allegedly led to the obstruction of the view of motorists using such roadway.²⁰
— the alleged negligence of an assistant United States Attorney in protecting a witness threatened by a suspected offender.²¹
— decisions by the Bureau of Indian Affairs regarding the maintenance of an aeration system designed to keep portions of a lake from freezing, as well as whether warnings of open water would be posted, and the method and manner of those warnings.²²

Observation:

Whether the government can take cost into account for purposes of the discretionary function exception depends on the applicable statutes, regulations, or policies,²³ and where the applicable statutes, regulations, or policies allow the government to take

budgetary considerations into account, the discretionary function exception applies.²⁴ If a particular government action is required, the government has no discretionary function immunity based on its choice to spend its money doing something else instead, but where the government is plainly required to balance expense against other desiderata, then consideration of cost is a discretionary function.²⁵

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Footnotes

¹ 28 U.S.C.A. § 2680(a).

² *Collins v. U.S.*, 783 F.2d 1225 (5th Cir. 1986).

³ § 210.

⁴ *Seaside Farm, Inc. v. United States*, 842 F.3d 853 (4th Cir. 2016); *Kohl v. U.S.*, 699 F.3d 935 (6th Cir. 2012); *Tippett v. U.S.*, 108 F.3d 1194 (10th Cir. 1997); *Wesberry v. United States*, 205 F. Supp. 3d 120 (D.D.C. 2016); *Diaz-Nieves v. U.S.*, 29 F. Supp. 3d 71 (D.P.R. 2014); *Federico v. Lincoln Military Housing, LLC*, 127 F. Supp. 3d 623 (E.D. Va. 2015).

⁵ *Stanford v. U.S.*, 992 F. Supp. 2d 764 (E.D. Ky. 2014), subsequent determination on other grounds, 2014 WL 2574492 (E.D. Ky. 2014).

⁶ *Fothergill v. U.S.*, 566 F.3d 248 (1st Cir. 2009); *Tippett v. U.S.*, 108 F.3d 1194 (10th Cir. 1997).

⁷ *Herden v. U.S.*, 726 F.3d 1042 (8th Cir. 2013); *Stanford v. U.S.*, 992 F. Supp. 2d 764 (E.D. Ky. 2014), subsequent determination, 2014 WL 2574492 (E.D. Ky. 2014).

⁸ *Joiner v. United States*, 955 F.3d 399 (5th Cir. 2020); *Campos v. United States*, 888 F.3d 724 (5th Cir. 2018), cert. denied, 139 S. Ct. 1317, 203 L. Ed. 2d 563 (2019).

⁹ *Evert v. U.S.*, 900 F. Supp. 2d 1280 (D. Wyo. 2012).

¹⁰ *Montijo-Reyes v. U.S.*, 436 F.3d 19 (1st Cir. 2006); *Hughes v. U.S.*, 110 F.3d 765 (11th Cir. 1997); *Shea Homes Ltd. Partnership v. U.S.*, 397 F. Supp. 2d 1194 (N.D. Cal. 2005); *Brown v. Fort Benning Family Communities LLC*, 108 F. Supp. 3d 1367 (M.D. Ga. 2015); *Diversified Carting, Inc. v. City of New York*, 423 F. Supp. 2d 85 (S.D. N.Y. 2005).

¹¹ *Carroll v. U.S.*, 661 F.3d 87 (1st Cir. 2011).

¹² *Abreu v. U.S.*, 468 F.3d 20 (1st Cir. 2006); *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191 (D.D.C. 2002); *Zion v. U.S.*, 913 F. Supp. 2d 379 (W.D. Ky. 2012); *Waverley View Investors, LLC v. U.S.*, 79 F. Supp. 3d 563 (D. Md. 2015); *Frasure v. U.S.*, 256 F. Supp. 2d 1180 (D. Nev. 2003); *Abrams-Fogliani v. U.S.*, 952 F. Supp. 143 (E.D. N.Y. 1996).

¹³ *Carroll v. U.S.*, 661 F.3d 87 (1st Cir. 2011); *Green v. U.S.*, 630 F.3d 1245 (9th Cir. 2011); *Shea Homes Ltd. Partnership v. U.S.*, 397 F. Supp. 2d 1194 (N.D. Cal. 2005); *Sledge v. U.S.*, 883 F. Supp. 2d 71 (D.D.C. 2012), decision aff'd, (D.C. Cir. 12-5287)(Dec. 13, 2013).

¹⁴ *Briggs v. Washington Metropolitan Area Transit Authority*, 293 F. Supp. 2d 8 (D.D.C. 2003).

¹⁵ *Macharia v. U.S.*, 334 F.3d 61 (D.C. Cir. 2003).

¹⁶ *Dichter-Mad Family Partners, LLP v. U.S.*, 709 F.3d 749 (9th Cir. 2013).

¹⁷ *French v. United States*, 195 F. Supp. 3d 947 (N.D. Ohio 2016).

18 Northlight Harbor, LLC v. U.S., 561 F. Supp. 2d 517 (D.N.J. 2008).

19 Brown v. U.S., 661 F. Supp. 2d 341 (E.D. N.Y. 2009).

20 Riley v. U.S., 486 F.3d 1030 (8th Cir. 2007).

21 Ochran v. U.S., 117 F.3d 495 (11th Cir. 1997).

22 Demery v. U.S. Dept. of Interior, 357 F.3d 830 (8th Cir. 2004).

23 National Union Fire Ins. v. U.S., 115 F.3d 1415 (9th Cir. 1997).

24 Walters v. U.S., 474 F.3d 1137 (8th Cir. 2007).

25 National Union Fire Ins. v. U.S., 115 F.3d 1415 (9th Cir. 1997).

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E. Procedure in Federal District Court Actions

1. Jurisdiction

b. Exceptions to Jurisdiction

§ 194. Jurisdiction of federal district court in federal tort claim action within scope of other federal laws

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[Federal compensation acts, in nature of workers' compensation acts, as affecting recovery against United States under Federal Tort Claims Act \(28 U.S.C.A. sec. 1346\(b\), 2671 et seq.\), 135 A.L.R. Fed. 403](#)

A suit under the Federal Tort Claims Act (FTCA) is barred when a claim arises under another federal statute, which provides an exclusive remedy for such claims,¹ or another statute provides for the immunity of the United States.² If a claim presents a substantial question of coverage under another federal statute, a plaintiff may be precluded from suing under the FTCA until the plaintiff has applied for and been denied benefits under such other federal statute.³

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Footnotes

¹ [U.S. v. Demko](#), 385 U.S. 149, 87 S. Ct. 382, 17 L. Ed. 2d 258 (1966); [Sanchez ex rel. D.R.-S. v. U.S.](#), 671 F.3d 86 (1st Cir. 2012); [Jarrett v. U.S.](#), 874 F.2d 201 (4th Cir. 1989); [Grijalva v. U.S.](#), 781 F.2d 472 (5th Cir. 1986).

² [Aetna Ins. Co. v. U.S.](#), 628 F.2d 1201 (9th Cir. 1980); [Bierer-Carter v. U.S.](#), 806 F. Supp. 2d 1245 (S.D. Fla. 2011).

³ [Wilder v. U.S.](#), 873 F.2d 285 (11th Cir. 1989); [Wreath v. U.S.](#), 897 F. Supp. 517 (D. Kan. 1995) (referring to a claim under the Longshore and Harborworkers' Compensation Act).

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b. Exceptions to Jurisdiction

§ 195. Jurisdiction of federal district court in federal tort claim action for injuries to military personnel arising out of or in the course of activity incident to service

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[Construction and Application of Combatant Activities Exception to Federal Tort Claims Act, 28 U.S.C.A. s2680\(j\), 23 A.L.R. Fed. 2d 489](#)

The Federal Tort Claims Act (FTCA) does not apply to any claim brought by military personnel for injuries which arise out of, or in the course of, activities incident to military service,¹ including a claim by or on behalf of persons serving in the United States Military Reserves,² as well as a derivative claim for emotional pain, distress, and anguish,³ or loss of consortium.⁴ This exception to the waiver of sovereign immunity, known as the *Feres* doctrine,⁵ bars a tort suit by a member of the military against the government under the FTCA even if the alleged negligence is by civilian employees of the federal government.⁶ The *Feres* doctrine is jurisdictional,⁷ and has been applied to bar—
— an action for the death of a Coast Guard officer while performing a rescue mission on the high seas.⁸
— an action by a member of the Naval Reserve against the United States for alleged medical malpractice committed by the Naval Reserve doctor who treated the plaintiff for a hand injury suffered while participating in a reserve drill, where the treatment occurred at a military facility and the plaintiff received military disability compensation for the injury and the subsequent complications.⁹
— an action brought by a service member for damages sustained off duty while using facilities and equipment restricted to military personnel.¹⁰

— an action brought by a former cadet at an United States military academy for injuries sustained when a safety railing collapsed during a football game, where the former cadet was on duty at the time of his injury and his attendance at the game was mandatory.¹¹

The *Feres* doctrine, which bars claims against the United States that are based on injuries which arise out of or are incident to the course of activity incident to an individual's military service, does not apply to torts that arise after completion of an individual's military service.¹²

Practice Tip:

Despite the *Feres* doctrine, negligence causing injury to a former service member is cognizable under the FTCA if an independent postservice negligent act on the part of the government is alleged and proved.¹³

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Footnotes

¹ *Feres v. U.S.*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950).

² *Estate of Martinelli v. U.S.*, Dept. of Army, 812 F.2d 872 (3d Cir. 1987).

³ *Torres-Morales v. U.S.*, 537 F. Supp. 2d 291 (D.P.R. 2007).

⁴ *Skees v. U.S. By and Through Dept. of Army*, 107 F.3d 421, 1997 FED App. 0071P (6th Cir. 1997).

⁵ *Feres v. U.S.*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950).

⁶ *U.S. v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987).

⁷ *Burton v. U.S.*, 668 F. Supp. 2d 86 (D.D.C. 2009); *Meagher v. Heggemeier*, 513 F. Supp. 2d 1083 (D. Minn. 2007).

⁸ *U.S. v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987).

⁹ *Jackson v. U.S.*, 110 F.3d 1484 (9th Cir. 1997).

¹⁰ *Bon v. U.S.*, 802 F.2d 1092 (9th Cir. 1986).

¹¹ *Galligan v. City of Philadelphia*, 156 F. Supp. 2d 467 (E.D. Pa. 2001).

¹² *Draughon v. U.S.*, 103 F. Supp. 3d 1266 (D. Kan. 2015).

¹³ *Molsbergen v. U.S.*, 757 F.2d 1016, 1 Fed. R. Serv. 3d 1051 (9th Cir. 1985).

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1. Jurisdiction

b. Exceptions to Jurisdiction

§ 196. Jurisdiction of federal district court in federal tort claim action arising from excepted intentional torts

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Construction and application of Federal Tort Claims Act provision (28 U.S.C.A. sec. 2680(h)) excepting from coverage claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process, 152 A.L.R. Fed. 605

Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of interference with contract rights (28 U.S.C.A. sec. 2680(h)), 92 A.L.R. Fed. 186

Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of assault and battery (28 U.S.C.A. sec. 2680(h)), 88 A.L.R. Fed. 7

Applicability of libel and slander exception to waiver of sovereign immunity under Federal Tort Claims Act (28 U.S.C.A. sec. 2680(h)), 79 A.L.R. Fed. 826

Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of misrepresentation and deceit (28 U.S.C.A. sec. 2680(h)), 30 A.L.R. Fed. 421

The Federal Tort Claims Act (FTCA) does not apply to any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights by a government employee.¹ The United States retains its sovereign immunity with regard to claims based on these enumerated torts committed by a government employee,² and a federal district court lacks subject matter jurisdiction over

such claims,³ and includes agents of the Immigration and Naturalization Services,⁴ but not federal mine inspectors.⁵ The intentional torts exception also does not apply, and the government therefore may be liable under the FTCA, where the claim involves injuries to persons who are entitled to be safe from foreseeable harm while in the custody and control of government personnel.⁶

The scope of the intentional torts exception is not absolutely limited to those torts specifically enumerated, in the sense that a distinct cause of action will nevertheless be deemed to arise out of an explicitly excepted cause of action when the underlying governmental conduct which constitutes the excepted cause of action is essential to the plaintiff's claim.⁷ In other words, even if a plaintiff styles his or her tort claim so that it is not one that is enumerated in the intentional torts exception to the government's waiver of sovereign immunity under the FTCA, the claim is barred if the underlying governmental conduct essential to the claim can fairly be read to arise out of conduct that would establish an excepted cause of action.⁸ For example, a claim for intentional infliction of emotional distress is barred under the FTCA when it arises out of a libel claim,⁹ and a claim for false light invasion of privacy also is barred since it arises under the libel and slander exception.¹⁰ If, however, some aspect of conduct upon which a plaintiff bases his or her tort claim does not constitute a tort listed in the intentional torts exception to the government's waiver of sovereign immunity, suit is not barred.¹¹ A claim based on a mere attempt to commit an excepted tort is not barred by the statutory exception,¹² nor is a claim alleging the wrongful disclosure of confidential and trade secret information on a federal agency website.¹³

One category of battery-related cases has been recognized as falling outside the intentional torts exception.¹⁴ Specifically, when a negligence claim against the government arises out of an incident of battery, but is in no way contingent on the perpetrator's federal employment status, that is, when the government's liability is based on its breach of a duty owed the victim that is independent of its relationship, if any, to the perpetrator, the intentional torts exception does not bar recovery under the FTCA.¹⁵ In addition, it is specifically provided by statute that the intentional torts exception does not apply to—

- any tort enumerated in such exception arising out of negligence in the furnishing of medical care or related services, including the conducting of clinical studies or investigations, by Department of State medical personnel.¹⁶
- any cause of action arising out of a negligent or wrongful act or omission by an Armed Forces medical employee in the performance of medical, dental, or related health care functions, including clinical studies and investigations.¹⁷
- any cause of action arising out of a negligent or wrongful act or omission by National Aeronautics and Space Administration medical personnel in the performance of medical, dental, or related health care functions, including clinical studies and investigations.¹⁸
- assault or battery arising out of negligence of a Public Health Service certified officer or employee in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations.¹⁹

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Footnotes

¹ 28 U.S.C.A. § 2680(h).

² *Cloonan v. Holder*, 602 F. Supp. 2d 25 (D.D.C. 2009).

³ *In re Supreme Beef Processors, Inc.*, 468 F.3d 248 (5th Cir. 2006); *Edmonds v. U.S.*, 436 F. Supp. 2d 28 (D.D.C. 2006); *Borawski v. Henderson*, 265 F. Supp. 2d 475 (D.N.J. 2003).

⁴ *Medina v. U.S.*, 259 F.3d 220 (4th Cir. 2001).

⁵ *Matsko v. U.S.*, 372 F.3d 556 (3d Cir. 2004).

⁶ *Harris v. U.S.*, 797 F. Supp. 91, 77 Ed. Law Rep. 186 (D.P.R. 1992).

⁷ *Metz v. U.S.*, 788 F.2d 1528 (11th Cir. 1986).

⁸ *Truman v. U.S.*, 26 F.3d 592 (5th Cir. 1994).

⁹ *Armstrong v. Geithner*, 610 F. Supp. 2d 66 (D.D.C. 2009), judgment aff'd, 608 F.3d 854 (D.C. Cir. 2010).

¹⁰ *Edmonds v. U.S.*, 436 F. Supp. 2d 28 (D.D.C. 2006).

11 Truman v. U.S., 26 F.3d 592 (5th Cir. 1994).

12 Edwards v. Reynaud, 463 F. Supp. 1235 (E.D. La. 1979).

13 Jerome Stevens Pharmaceuticals, Inc. v. Food & Drug Admin., 402 F.3d 1249 (D.C. Cir. 2005).

14 Sheridan v. U.S., 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988); Martinez v. U.S., 311 F. Supp. 2d 1274 (D.N.M. 2004).

15 Sheridan v. U.S., 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988); Martinez v. U.S., 311 F. Supp. 2d 1274 (D.N.M. 2004).

16 22 U.S.C.A. § 2702(e).

17 10 U.S.C.A. § 1089(e).

18 51 U.S.C.A. § 20137(e).

19 42 U.S.C.A. § 233(e).

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35A Am. Jur. 2d Federal Tort Claims Act § 197

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2. Venue

§ 197. Venue under Federal Tort Claims Act, generally

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Venue as to a Federal Tort Claims Act (FTCA) suit is governed by the general venue statute¹ governing suits in which the United States is a defendant.² This statute provides that any civil action on a tort claim against the United States under the jurisdictional provision of the FTCA³ may be prosecuted only in the judicial district where the plaintiff resides or where the act or omission complained of occurred.⁴ The FTCA allows venue in a district if sufficient activity giving rise to the plaintiff's cause of action took place in the district.⁵ When conduct occurs in one district but has intended effects elsewhere, the act "occurs," for purposes of venue in an action brought under the FTCA, in the jurisdiction where its effects are directed.⁶

Observation:

Under the prevailing interpretation of the jurisdictional provision of the FTCA, venue in a civil action on a tort claim against the United States is proper in the District of Columbia if sufficient activities giving rise to the plaintiff's cause of action took place there.⁷

In a wrongful death action brought by the decedent's administrator, venue is determined in accordance with the personal residence of the administrator, and not the residence of the decedent or the place of appointment of the administrator.⁸

If the United States is impleaded as a third-party defendant, the third-party proceeding is maintainable even though venue of

the principal action is not in the judicial district where the plaintiff resides or where the act complained of occurred, if the United States suffers no disadvantage or inconvenience.⁹ Furthermore, the original plaintiff may amend his or her complaint to state a claim against the United States which is a third-party defendant in the case, even though venue would have been improper had the plaintiff filed a direct action against the United States at the outset, where an action by the plaintiff directly against the United States on the same cause of action is pending in a district in which venue is proper.¹⁰

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Footnotes

¹ 28 U.S.C.A. § 1402(b).

² *Head v. Federal Bureau of Prisons*, 86 F. Supp. 3d 1 (D.D.C. 2015); *Bartel v. F.A.A.*, 617 F. Supp. 190 (D.D.C. 1985).

³ 28 U.S.C.A. § 1346(b).

⁴ 28 U.S.C.A. § 1402(b).

⁵ *Jones v. U.S.*, 820 F. Supp. 2d 58 (D.D.C. 2011); *Hahn v. U.S.*, 457 F. Supp. 2d 27 (D.D.C. 2006).

⁶ *Patel v. Phillips*, 933 F. Supp. 2d 153 (D.D.C. 2013).

⁷ *Hoskins v. Napolitano*, 842 F. Supp. 2d 8 (D.D.C. 2012); *Tildon v. Alexander*, 587 F. Supp. 2d 242 (D.D.C. 2008).

⁸ *Buchheit v. United Air Lines, Inc.*, 202 F. Supp. 811 (S.D. N.Y. 1962).

⁹ *U.S. v. Acord*, 209 F.2d 709 (10th Cir. 1954).

¹⁰ *Abramovitch v. U.S. Lines*, 174 F. Supp. 587 (S.D. N.Y. 1959).

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2. Venue

§ 198. Change of venue under Federal Tort Claims Act

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The statutory provision for change of venue in civil actions generally,¹ which provides that for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented, is applicable to an action brought under the Federal Tort Claims Act (FTCA).² When Federal Tort Claims Act claims have been brought in the wrong venue, the decision whether a transfer or a dismissal is in the interest of justice rests within the sound discretion of the district court.³ A defendant, however, must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum,⁴ and the plaintiff's choice of a forum is honored, in an action under the FTCA, if the activities that transpired in the forum district were not insubstantial in relation to the totality of events giving rise to the plaintiff's grievance.⁵

Observation:

In assessing whether to transfer Federal Tort Claims Act claims that have been brought in the wrong venue, the court can take a peek at the merits, since whether or not the suit has any possible merit bears significantly on whether the court should transfer or dismiss it.⁶

¹ 28 U.S.C.A. § 1404(a).

² *Relf v. Gasch*, 511 F.2d 804 (D.C. Cir. 1975); *Nowotny v. Turner*, 203 F. Supp. 802 (M.D. N.C. 1962); *Kephart v. U.S.*, 242 F. Supp. 469 (E.D. Pa. 1965).

³ *Sanchez-Mercedes v. Bureau of Prisons*, 453 F. Supp. 3d 404 (D.D.C. 2020).

⁴ *Toro v. U.S.*, 287 F. Supp. 2d 1235 (D. Haw. 2003).

⁵ *Hahn v. U.S.*, 457 F. Supp. 2d 27 (D.D.C. 2006).

⁶ *Sanchez-Mercedes v. Bureau of Prisons*, 453 F. Supp. 3d 404 (D.D.C. 2020).

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3. Parties

§ 199. Subrogee as plaintiff under Federal Tort Claims Act

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An insurance company may bring a suit in its own name against the United States upon a claim arising under the Federal Tort Claims Act to which it has become subrogated, wholly or in part, by payment to an insured, notwithstanding the antiassignment statute,¹ which invalidates transfers and assignments of claims against the United States.² If the insurance company has paid the entire loss suffered by the insured, the insurer is the real party in interest, and it must sue in its own name.³ In the case of partial subrogation, either the insured or the insurer may sue.⁴

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Footnotes

¹ [31 U.S.C.A. § 3727](#).

² [U.S. v. Aetna Cas. & Sur. Co.](#), 338 U.S. 366, 70 S. Ct. 207, 94 L. Ed. 171, 56 Ohio L. Abs. 33, 12 A.L.R.2d 444 (1949).

³ [U.S. v. Aetna Cas. & Sur. Co.](#), 338 U.S. 366, 70 S. Ct. 207, 94 L. Ed. 171, 56 Ohio L. Abs. 33, 12 A.L.R.2d 444 (1949).

⁴ [U.S. v. Aetna Cas. & Sur. Co.](#), 338 U.S. 366, 70 S. Ct. 207, 94 L. Ed. 171, 56 Ohio L. Abs. 33, 12 A.L.R.2d 444 (1949).

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§ 200. Substitution of plaintiffs under Federal Tort Claims Act

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The substitution of a party as the plaintiff in a suit under the Federal Tort Claims Act (FTCA) is permitted.¹ Specifically, where there is no substantive difference between the claim out of which a suit under the FTCA arises and the administrative claim which was presented to the appropriate federal agency, but the suit is brought by the owner of the property in question rather than the insurer who filed the administrative claim, an amendment to substitute the insurer as plaintiff should be permitted.²

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Footnotes

¹ [Nicholson Air Service, Inc. v. U.S.](#), 686 F. Supp. 538, 11 Fed. R. Serv. 3d 1197 (D. Md. 1988). As to the amendment of a complaint substituting a new plaintiff and its relating back to the filing of the original complaint, see § 211.

² [Nicholson Air Service, Inc. v. U.S.](#), 686 F. Supp. 538, 11 Fed. R. Serv. 3d 1197 (D. Md. 1988).

35A Am. Jur. 2d Federal Tort Claims Act § 201

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§ 201. Class actions under Federal Tort Claims Act

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A.L.R. Library

[When may claims against United States under Federal Tort Claims Act \(28 U.S.C.A. secs. 2671-2680\) be maintained as class action, 48 A.L.R. Fed. 860](#)

The Federal Tort Claims Act (FTCA) implicitly allows for the filing of class actions, since it provides that the United States is liable for torts in the same manner and to the same extent as a private individual.¹ A class action suit may be certified against the United States under the FTCA.² In order for a case to be maintained as a class action for damages against the United States under the FTCA, however, each alleged class member must exhaust administrative remedies as required by statute.³

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Footnotes

¹ [Miles v. Bell, 621 F. Supp. 51 \(D. Conn. 1985\).](#)

² [In re Katrina Canal Breaches Consolidated Litigation, 2009 WL 1649501 \(E.D. La. 2009\).](#)

³ [§ 181.](#)

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§ 202. Federal agency or employee as defendant in Federal Tort Claims Act action

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The United States is the only proper defendant in a Federal Tort Claims Act (FTCA) action.¹ Although there is authority allowing an action under the FTCA to be brought against the United States by naming an officer of a federal agency without naming the United States as a party,² the general rule, in keeping with the exclusiveness of the remedies provided under the FTCA,³ is that the action must be brought against the United States in its own name and not by naming a federal agency,⁴ or by naming federal officials or employees.⁵ In other words, federal agencies,⁶ and federal employees acting within the scope of their employment,⁷ are not proper defendants under the FTCA, and the United States is required to be substituted as the defendant in their stead.⁸

Caution:

A case which names a federal agency as the sole defendant will be dismissed with prejudice, where the motion to substitute the United States as defendant would not relate back to the initial filing, and the United States was not notified of the suit until after the statute of limitations had expired.⁹

¹ CNA v. U.S., 535 F.3d 132 (3d Cir. 2008), as amended on other grounds, (Sept. 29, 2008); Jackson v. Kotter, 541 F.3d 688, 71 Fed. R. Serv. 3d 785 (7th Cir. 2008); Smith v. U.S., 561 F.3d 1090 (10th Cir. 2009); Sandowski v. McAleenan, 423 F. Supp. 3d 959 (D. Haw. 2019); Roemen v. United States, 463 F. Supp. 3d 990 (D.S.D. 2020).

² Martin v. Block, 20 V.I. 300, 571 F. Supp. 1180 (D.V.I. 1983), citing *Block v. Neal*, 460 U.S. 289, 103 S. Ct. 1089, 75 L. Ed. 2d 67 (1983), in which the Secretary of Agriculture and other federal agency officers were named as defendants, the United States was not named as a party, and the Supreme Court ruled on the merits of the case against the defendant.

³ §§ 139, 140.

⁴ Galvin v. Occupational Safety & Health Admin., 860 F.2d 181, 12 Fed. R. Serv. 3d 1498 (5th Cir. 1988); Mars v. Hanberry, 752 F.2d 254 (6th Cir. 1985); Woods v. U.S., 720 F.2d 1451 (9th Cir. 1983); McCloskey v. Mueller, 385 F. Supp. 2d 74 (D. Mass. 2005), aff'd, 446 F.3d 262 (1st Cir. 2006); Rogers v. U.S., 696 F. Supp. 2d 472 (W.D. Pa. 2010); Ramirez v. United States, 410 F. Supp. 3d 824 (S.D. Tex. 2019).

⁵ Mars v. Hanberry, 752 F.2d 254 (6th Cir. 1985); Morris v. U.S., 521 F.2d 872 (9th Cir. 1975).

⁶ Whittaker v. Court Services and Offender Supervision Agency for District of Columbia, 401 F. Supp. 3d 170 (D.D.C. 2019); Continental Ins. Co. of N.J. v. U.S., 335 F. Supp. 2d 532 (D.N.J. 2004); Cortez v. E.E.O.C., 585 F. Supp. 2d 1273 (D.N.M. 2007); Solis-Alarcon v. U.S., 432 F. Supp. 2d 236 (D.P.R. 2006).

⁷ Nacke v. United States, 783 Fed. Appx. 277 (4th Cir. 2019); Davis v. U.S., 430 F. Supp. 2d 67 (D. Conn. 2006); Coulibaly v. Pompeo, 318 F. Supp. 3d 176 (D.D.C. 2018); Parry v. VA Medical Center, 408 F. Supp. 3d 281 (W.D. N.Y. 2019).

⁸ Rambarrat ex rel. Rambarrat v. U.S., 347 F. Supp. 2d 6 (S.D. N.Y. 2004).

⁹ Dilg v. U.S. Postal Service, 635 F. Supp. 406 (D.N.J. 1985).

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§ 203. Joinder in Federal Tort Claims Act action

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The United States may compel the joinder of parties in interest as plaintiffs in an action under the Federal Tort Claims Act.¹ The right of an insurance company, as a partial subrogee, to sue in its own name is subject to the right of the United States upon timely motion to insist upon the joinder of any other party in interest in order to avoid a split of the cause of action.²

In an action against an individual defendant in which the subsequent joinder of the United States as a party defendant is improper due to lack of jurisdiction over the United States, the erroneous joinder does not defeat jurisdiction which exists as to the original defendant.³

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Footnotes

¹ [U.S. v. Aetna Cas. & Sur. Co.](#), 338 U.S. 366, 70 S. Ct. 207, 94 L. Ed. 171, 56 Ohio L. Abs. 33, 12 A.L.R.2d 444 (1949).

² [U.S. v. Aetna Cas. & Sur. Co.](#), 338 U.S. 366, 70 S. Ct. 207, 94 L. Ed. 171, 56 Ohio L. Abs. 33, 12 A.L.R.2d 444 (1949).
As to the right of an insurance company as subrogee to sue, generally, see [§ 199](#).

³ [Sappington v. Barrett](#), 182 F.2d 102 (D.C. Cir. 1950).

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§ 204. Impleader in Federal Tort Claims Act action

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The United States may be impleaded under the Federal Tort Claims Act (FTCA) as a third-party defendant in an action for contribution due a joint tortfeasor.¹ Impleader of the United States as a third-party defendant, however, is permissible only if there would have been jurisdiction over a direct action against the United States by the third-party plaintiff.²

An absent third party, who may be liable to the United States for all or part of the plaintiff's claim, is subject to impleader by the United States in an action under the FTCA,³ where there is a substantive right to the relief sought by the United States against the third-party defendant.⁴ The United States is not entitled to indemnity from one of its employees after it has been held liable under the FTCA for injuries negligently caused by the employee.⁵

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¹ [U.S. v. Yellow Cab Co.](#), 340 U.S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951); [Azure v. U.S. Health and Human Services](#), 758 F. Supp. 1382 (D. Mont. 1991).

² [Stencel Aero Engineering Corp. v. U. S.](#), 431 U.S. 666, 97 S. Ct. 2054, 52 L. Ed. 2d 665 (1977).

³ [Irvin v. U.S.](#), 148 F. Supp. 25 (D.S.D. 1957).

⁴ [Estate of Nobile v. U.S.](#), 193 F.R.D. 58 (D. Conn. 2000).

⁵ [U.S. v. Gilman](#), 347 U.S. 507, 74 S. Ct. 695, 98 L. Ed. 898 (1954).

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4. Defense by Attorney General

§ 205. Defense by Attorney General in civil action based on act or omission of federal employee, generally

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Forms

[Am. Jur. Pleading and Practice Forms, Federal Tort Claims Act § 114](#) (Notice—Of removal of civil action from state court to federal district court—By attorney for United States)

Under the Federal Tort Claims Act, the United States Attorney General is required to defend any civil action or proceeding brought in any court against any employee of the federal government or the employee's estate for injury or loss of property, or personal injury or death, arising or resulting from the negligent or wrongful act or omission of any employee of the government while acting within the scope of the employee's office or employment.¹ The employee against whom such civil action or proceeding is brought must deliver within such time after the date of service or knowledge of service as determined by the Attorney General, all process served upon it, or an attested true copy of such process, to the employee's immediate superior or the person designated by the head of the employee's department to receive such papers.² The person who receives such documents must promptly furnish copies of the pleadings and process to the United States Attorney for the district embracing the place in which the proceeding is brought, to the Attorney General, and to the head of the employing federal agency.³

Observation:

The requirement that the Attorney General defend a civil action brought against a federal employee acting within the scope of

employment precludes the reimbursement of any privately retained attorney's fees and costs incurred by an employee in such an action.⁴

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Footnotes

¹ [28 U.S.C.A. § 2679\(c\)](#).

² [28 U.S.C.A. § 2679\(c\)](#).

³ [28 U.S.C.A. § 2679\(c\)](#).

⁴ [Castillo v. U.S., 707 F.2d 422 \(9th Cir. 1983\)](#).

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4. Defense by Attorney General

§ 206. Review of denial of representation request by government employee for defense by Attorney General in civil action for injury or loss

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If a request by a federal government employee for representation by the United States Attorney General in a civil action for injury or loss, arising or resulting from the negligent or wrongful act or omission of the employee while acting within the scope of its office or employment, is denied, the employee is entitled to a review of the decision, although an administrative hearing is not required.¹

Judicial review of a decision denying a request for representation is not available by mandamus if the person requesting representation has not exhausted available administrative remedies,² or if the person has not sought available judicial review under the Administrative Procedure Act.³

The appropriate standard for judicial review of a decision denying a request for representation is whether the Attorney General's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.⁴ Judicial review will focus entirely on the administrative record compiled by the Attorney General, and there is no right to a de novo review of the administrative decision notwithstanding the lack of an administrative hearing.⁵ If the administrative record cannot sustain the administrative decision, the proper remedy is to remand the case for further consideration.⁶

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Footnotes

¹ [Proietti v. Levi](#), 530 F.2d 836 (9th Cir. 1976).

² [Lemley v. Mitchell](#), 304 F. Supp. 1271 (D. D.C. 1969).

³ [Seiden v. U.S., 537 F.2d 867 \(6th Cir. 1976\)](#).

⁴ [Proietti v. Levi, 530 F.2d 836 \(9th Cir. 1976\)](#).

⁵ [Proietti v. Levi, 530 F.2d 836 \(9th Cir. 1976\)](#).

⁶ [Proietti v. Levi, 530 F.2d 836 \(9th Cir. 1976\)](#).

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5. Service of Process

§ 207. Service of process in Federal Tort Claims Act action

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A failure to effect proper, timely service upon the United States empowers the United States district court to dismiss a complaint under the Federal Tort Claims Act (FTCA) without prejudice.¹ In some courts, strict compliance with the Federal Rule of Civil Procedure regarding service of process on the United States² is mandatory in a FTCA action,³ while in other courts, if the necessary parties in the government have actual notice of a suit, suffer no prejudice from a technical defect in service, and if there is a justifiable excuse for the failure to serve properly, the governing rule will not be rigidly construed.⁴

In a jurisdiction which enforces strict compliance with the governing rule of civil procedure regarding service, proper service of an action under the FTCA is not effected where the United States Attorney General receives the summons and complaint by mail, rather than by personal service.⁵

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¹ [Hunt v. Department of Air Force, Div. of USA](#), 29 F.3d 583, 29 Fed. R. Serv. 3d 1193 (11th Cir. 1994).

² Fed. R. Civ. P. 4(i).

³ [Messenger v. United States](#), 231 F.2d 328 (2d Cir. 1956); [McMasters v. U.S.](#), 260 F.3d 814, 50 Fed. R. Serv. 3d 522 (7th Cir. 2001).

⁴ [Jordan v. U.S.](#), 694 F.2d 833, 35 Fed. R. Serv. 2d 422 (D.C. Cir. 1982); [Fugle v. U.S.](#), 157 F. Supp. 81 (D. Mont. 1957).

⁵ [McMasters v. U.S.](#), 260 F.3d 814, 50 Fed. R. Serv. 3d 522 (7th Cir. 2001).

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6. Pleadings

a. Complaint

§ 208. Complaint in Federal Tort Claims Act action, generally

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The complaint in an action under the Federal Tort Claims Act (FTCA) should disclose that the plaintiff has a clear right to bring the action,¹ and must contain a short and plain statement of the grounds upon which the court's jurisdiction depends.² All the elements set forth in the statute defining the jurisdiction of the United States district courts³ must be alleged in order for the claim to be actionable.⁴ The local law upon which liability of the United States is asserted also must be pleaded.⁵

In a subrogation case, the complaint must reveal and assert the actual interest of the plaintiff, and indicate the interest of any other claimant.⁶

A plaintiff may not include in its FTCA complaint new and different claims for relief from those alleged in the prior administrative claim.⁷

Observation:

A claim under the FTCA will be dismissed for pleading deficiencies where it makes broad, unsubstantiated allegations, asserting no names or dates or explanations for the behavior it attributes to government officials.⁸

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¹ [Wooldridge Mfg. Co. v. U.S.](#), 235 F.2d 513 (D.C. Cir. 1956); [Avina v. U.S.](#), 115 F. Supp. 579 (W.D. Tex. 1953).

² Fed. R. Civ. P. 8(a)(1).

³ [28 U.S.C.A. § 1346\(b\)\(1\)](#), discussed at [§ 185](#).

As to the allegation of compliance with the jurisdictional administrative-exhaustion requirement, see [§ 209](#).

⁴ [F.D.I.C. v. Meyer](#), 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994).

⁵ [U.S. v. Spelar](#), 338 U.S. 217, 70 S. Ct. 10, 94 L. Ed. 3 (1949).

⁶ [U.S. v. Aetna Cas. & Sur. Co.](#), 338 U.S. 366, 70 S. Ct. 207, 94 L. Ed. 171, 56 Ohio L. Abs. 33, 12 A.L.R.2d 444 (1949).

⁷ [Carter v. U.S.](#), 667 F. Supp. 2d 1259 (D. Kan. 2009).

⁸ [Engle v. U.S.](#), 736 F. Supp. 670 (D. Md. 1989), order aff'd, 902 F.2d 28 (4th Cir. 1990).

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a. Complaint

§ 209. Required allegation in Federal Tort Claims Act action of presentment of administrative claim

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A complaint seeking recovery from the United States under the Federal Tort Claims Act (FTCA) must contain allegations demonstrating compliance with the statutory¹ Administrative-exhaustion requirement.² A plaintiff has the burden of pleading compliance with the administrative-exhaustion requirement,³ and a vague allegation of exhaustion unsubstantiated by facts is insufficient to satisfy this pleading requirement.⁴

An action brought under the FTCA must be dismissed for lack of subject matter jurisdiction if the complaint fails to allege compliance with the administrative-exhaustion requirement,⁵ although the pleader should first be given an opportunity to file an amended complaint to attempt to cure the pleading defect.⁶ A motion to amend, however, will not be granted if the proposed additions to the complaint fail to allege the presentation of the plaintiff's claim to the appropriate federal agency and a final disposition of the claim by that agency.⁷ The failure to exhaust administrative remedies prior to filing suit cannot be remedied by amending the complaint at a later date.⁸

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Footnotes

¹ [28 U.S.C.A. § 2675](#), discussed generally at [§ 157](#).

² *In re Agent Orange Product Liability Litigation*, 818 F.2d 210, 7 Fed. R. Serv. 3d 1056 (2d Cir. 1987); *Grantham v. Durant*, 471 F. Supp. 2d 1069 (D. Nev. 2006); *Collins v. United States Postal Service*, 462 F. Supp. 3d 231 (E.D. N.Y. 2020); *Tesh v. U.S. Postal Service*, 215 F. Supp. 2d 1220 (N.D. Okla. 2002).

³ [Mingo v. U.S.](#), 274 F. Supp. 2d 336 (E.D. N.Y. 2003); [Lowery v. U.S. Dept. of Educ.](#), 499 F. Supp. 2d 928, 223 Ed. Law Rep. 778 (N.D. Ohio 2007).

⁴ [Healy v. U.S. Postal Service](#), 677 F. Supp. 1284 (E.D. N.Y. 1987) (rejected on other grounds by, [Coleman v. Nolan](#), 693 F. Supp. 1544 (S.D. N.Y. 1988)).

⁵ [Page v. United States Agency for Global Media](#), 797 Fed. Appx. 550 (2d Cir. 2019); [Chodos v. F.B.I.](#), 559 F. Supp. 69 (S.D. N.Y. 1982), order aff'd, 697 F.2d 289 (2d Cir. 1982).

As to the requirement of administrative exhaustion being jurisdictional, see [§ 157](#).

⁶ [Gillespie v. Civiletti](#), 629 F.2d 637, 30 Fed. R. Serv. 2d 407 (9th Cir. 1980).

⁷ [Lann v. Hill](#), 436 F. Supp. 463 (W.D. Okla. 1977).

⁸ [Edwards v. District of Columbia](#), 616 F. Supp. 2d 112 (D.D.C. 2009).

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§ 210. Required allegation in complaint that statutory exception to Federal Tort Claims Act not applicable

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If a case appears to fall within one of the statutory exceptions to the applicability of the Federal Tort Claims Act (FTCA), the facts which are claimed to circumvent the application of such exception must be pleaded at the outset of the case by the plaintiff in his or her complaint.¹ In other words, the plaintiff must draft a complaint that is facially outside the statutory exceptions.² For example, if the discretionary function exception to the FTCA is at issue in a case, the complaint must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.³ A plaintiff cannot avoid the effect of the statutory exceptions by the simple expedient of drafting a complaint in terms of a tort which does lie under the FTCA when in reality the claim is one as to which the United States remains immunized, such as by making a claim of medical malpractice which is in substance identical to a claim for false imprisonment from which the United States is immune,⁴ or by requesting damages for negligence when the case deals exclusively with assault, battery, misrepresentation, and/or deceit.⁵

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Footnotes

¹ [Johnson by Johnson v. U.S.](#), 788 F.2d 845 (2d Cir. 1986).
As to such exceptions, generally, see § 192.

² [Littell v. U.S.](#), 191 F. Supp. 2d 1338 (M.D. Fla. 2002).

³ [Terbush v. U.S.](#), 516 F.3d 1125 (9th Cir. 2008); [Atherton v. United States](#), 174 F. Supp. 3d 359 (D.D.C. 2016), aff'd, 689 Fed. Appx. 643 (D.C. Cir. 2017); [Greer v. United States](#), 333 F. Supp. 3d 631 (W.D. La. 2018); [Quigley v. U.S.](#),

927 F. Supp. 2d 213 (D. Md. 2012); *Miller v. U.S.*, 642 F. Supp. 2d 437 (M.D. Pa. 2009); *Mayfield v. United States*, 365 F. Supp. 3d 791 (W.D. Tex. 2019).

As to the discretionary function exception to the applicability of the FTCA, see § 193.

⁴ *Johnson v. U.S.*, 547 F.2d 688 (D.C. Cir. 1976).

⁵ *Turner v. U.S.*, 595 F. Supp. 708 (W.D. La. 1984).

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a. Complaint

§ 211. Amendment and relation back of complaint in Federal Tort Claims Act action

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In accordance with the Federal Rule of Civil Procedure governing the relation back of pleading amendments,¹ an amendment of a complaint filed under the Federal Tort Claims Act (FTCA) is allowed to relate back to the date of the original complaint so as to avoid the bar of the statute of limitations,² when the statutory period of limitations has run after the commencement of the action but before the amendment, if the amended complaint is to substitute the real party in interest as plaintiff and the United States was aware of the new plaintiff's claim within the limitation period.³ In order for the amendment of a complaint to substitute a new plaintiff to relate back to the filing of the original complaint in a FTCA action, the same conduct, transaction, or occurrence originally alleged as a basis for the action must be relied upon by the substituted plaintiff.⁴ Moreover, there must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendant can be said to have received adequate notice of the latecomer's claim against the defendant so as to avoid prejudice, and the defendant must have known or should have known that the new plaintiff would have brought the action against it but for a mistake concerning the identity of the proper party.⁵

An amendment to a FTCA complaint changing the capacity in which the plaintiff brings the action,⁶ or completely changing the plaintiff's legal theory,⁷ may relate back to the date of the original complaint. Some authority holds that an amendment of the complaint to add or substitute the United States as a party defendant does not relate back,⁸ although other authority holds that an amendment to a FTCA complaint to add the United States as a defendant does relate back to the original complaint.⁹

An amendment of the complaint is not ordinarily allowed to relate back when the amendment is to add a new claim which is otherwise time barred,¹⁰ although in some circumstances, an amendment adding a new claim by the same plaintiff but in a different capacity is allowed to relate back.¹¹ Such circumstances exist when an injured minor's parent seeks to amend a complaint brought as a next friend to recover for the minor's injuries to include a claim in the parent's own right for recovery of loss of services of the injured minor and the occurrence, upon which the parent's claim is based, as an operational set of facts, is stated fully in the original complaint and subsequently proved; the original complaint, read with the required

liberality, clearly reveals the existence of a minor, said parent as a parent, and the assertion by the parent of a claim; and the government is put on notice that the parent's claim is also involved, and hence suffers no prejudice.¹²

A United States district court's authority to relate an amended complaint back is limited to the date of the original pleading, and accordingly, dismissal of a FTCA complaint is proper where the complaint was filed before the plaintiff was sent written notice of the final administrative denial of the plaintiff's claim, notwithstanding the plaintiff's contention that the amended complaint should have related back to the day before the end of the limitation period, being the date on which the plaintiff properly served the defendants.¹³

Observation:

A plaintiff's motion for leave to amend a FTCA complaint may be denied, where the motion is made a considerable period of time after the start of litigation and after the completion of discovery,¹⁴ or where the amendment would be futile,¹⁵ such as when the claim would be barred by an exception to the waiver of sovereign immunity under the FTCA.¹⁶

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Footnotes

¹ Fed. R. Civ. P. 15(c).

² 28 U.S.C.A. § 2401(b).

³ Executive Jet Aviation, Inc. v. U.S., 507 F.2d 508 (6th Cir. 1974); Wadsworth v. U.S. Postal Service, 511 F.2d 64, 19 Fed. R. Serv. 2d 1271 (7th Cir. 1975).

⁴ Penn Millers Ins. Co. v. U.S., 472 F. Supp. 2d 705 (E.D. N.C. 2007).

⁵ Penn Millers Ins. Co. v. U.S., 472 F. Supp. 2d 705 (E.D. N.C. 2007).

⁶ Petrizzo v. U.S., 8 F.R.D. 367 (D. Conn. 1948).

⁷ U.S. v. Johnson, 288 F.2d 40, 4 Fed. R. Serv. 2d 277 (5th Cir. 1961).

⁸ Carr v. Veterans Administration, 522 F.2d 1355, 21 Fed. R. Serv. 2d 122 (5th Cir. 1975); Scheimer v. National Capital Region, Nat. Park Service, 737 F. Supp. 3 (D.D.C. 1990).

⁹ Jackson v. Kotter, 541 F.3d 688, 71 Fed. R. Serv. 3d 785 (7th Cir. 2008); Murray v. U.S. Postal Service, 569 F. Supp. 794, 37 Fed. R. Serv. 2d 511 (N.D. N.Y. 1983).

¹⁰ Neher v. U.S., 265 F. Supp. 210 (D. Minn. 1967).

¹¹ Williams v. U.S., 405 F.2d 234, 12 Fed. R. Serv. 2d 228, 12 A.L.R. Fed. 224 (5th Cir. 1968).

¹² Williams v. U.S., 405 F.2d 234, 12 Fed. R. Serv. 2d 228, 12 A.L.R. Fed. 224 (5th Cir. 1968).

¹³ Reynolds v. U.S., 748 F.2d 291, 40 Fed. R. Serv. 2d 1079 (5th Cir. 1984).

¹⁴ Alinsky v. U.S., 415 F.3d 639 (7th Cir. 2005).

¹⁵ Bramwell v. U.S. Bureau of Prisons, 348 F.3d 804 (9th Cir. 2003); Hall v. U.S., 233 F.R.D. 591 (D. Nev. 2005).

¹⁶ Bramwell v. U.S. Bureau of Prisons, 348 F.3d 804 (9th Cir. 2003); Goodin v. U.S. Postal Inspection Service, 393 F. Supp. 2d 869 (D. Minn. 2005), aff'd, 444 F.3d 998, 64 Fed. R. Serv. 3d 507 (8th Cir. 2006); Martinez v. U.S., 311 F. Supp. 2d 1274 (D.N.M. 2004).

As to FTCA exceptions, generally, see § 192.

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§ 212. Defense of statute of limitations in Federal Tort Claims Act action

[Topic Summary](#) [Correlation Table](#) [References](#)

West's Key Number Digest

West's Key Number Digest, [United States](#)  968

The statute of limitations applicable to actions under the Federal Tort Claims Act (FTCA)¹ is ordinarily available as a defense without a formal plea as is generally required by the Federal Rules of Civil Procedure,² and may be raised by a motion to dismiss the complaint on the ground that it fails to state a claim upon which relief can be granted.³ There is authority, however, that the defense of the statute of limitations must be pled affirmatively by the United States in its answer to the FTCA complaint.⁴

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Footnotes

¹ [28 U.S.C.A. § 2401\(b\)](#), discussed at [§ 188](#).

² [Fed. R. Civ. P. 8\(c\)](#).

³ [U.S. v. Croft-Mullins Elec. Co.](#), 333 F.2d 772 (5th Cir. 1964); [Martin v. U.S.](#), 436 F. Supp. 535 (S.D. Cal. 1977); [Levitch v. U.S.](#), 114 F. Supp. 572 (W.D. Mo. 1953).

⁴ [James v. U.S.](#), 215 F.R.D. 590 (E.D. Cal. 2002); [Weber v. U.S.](#), 8 F.R.D. 161 (W.D. N.Y. 1948).

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§ 213. Defense of exception to waiver of sovereign immunity in Federal Tort Claims Act action

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West's Key Number Digest

West's Key Number Digest, [United States](#)  968

If the Federal Tort Claims Act does not apply to a claim because of a stated exception to the waiver of sovereign immunity by the United States, that stated exception generally may be raised as an issue at any time.¹ A defense premised on the basis that there is no jurisdiction to hear a case falling within one of the exceptions should be raised by a motion to dismiss for lack of subject matter jurisdiction rather than by a motion for summary judgment.² On a motion to dismiss, the plaintiff must advance a claim that is facially outside the stated exception in order to survive the motion to dismiss.³

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Footnotes

¹ [Anderson v. Bailer](#), 459 F. Supp. 792 (M.D. Fla. 1978), aff'd, 619 F.2d 81 (5th Cir. 1980). As to such exceptions, generally, see § 192.

² [Stanley v. Central Intelligence Agency](#), 639 F.2d 1146, 31 Fed. R. Serv. 2d 988 (5th Cir. 1981).

³ [St. Tammany Parish, ex rel. Davis v. Federal Emergency Management Agency](#), 556 F.3d 307 (5th Cir. 2009).

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§ 214. Sanctions for improprieties in pleadings in Federal Tort Claims Act action

[Topic Summary](#) [Correlation Table](#) [References](#)

West's Key Number Digest

West's Key Number Digest, [United States](#)  968, 970

In an action under the Federal Tort Claims Act (FTCA), the United States district court is not precluded from awarding sanctions pursuant to federal rule¹ against the United States for improprieties in its pleadings because of the sovereign immunity doctrine, since by consenting to be sued in federal court under the FTCA the government can be considered to have consented to rules under which that court operates.²

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Footnotes

¹ [Fed. R. Civ. P. 11](#).

² [Joseph v. U.S.](#), 121 F.R.D. 406 (D. Haw. 1988).

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§ 215. Discovery in Federal Tort Claims Act action

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West's Key Number Digest

West's Key Number Digest, [United States](#) 969(1) to 969(3)

By consenting to being sued under the Federal Tort Claims Act (FTCA), the United States has submitted to having discovery proceedings invoked against it,¹ and a plaintiff whose complaint states a claim under the FTCA may engage in discovery.² The United States may be compelled to answer interrogatories,³ and discovery proceedings may be used by the plaintiff to obtain information as to the applicability of a statutory exception asserted by the government to the case,⁴ or to require the United States to produce relevant documents.⁵ The government, however, is under no obligation to provide an individual with information concerning an ongoing criminal investigation in order to facilitate the filing of a FTCA action.⁶ The United States, as the defendant in a FTCA action, also may engage in discovery proceedings.⁷

A plaintiff in a FTCA action is not precluded from seeking discovery about actions taken by other federal agencies that were not named in the plaintiff's administrative claim if that information is relevant to the intent and actions of the government employees and agencies that were named in the administrative claim, since it does not matter whether the other agencies' actions could form the basis for relief as long as their actions or situations helped motivate employees whose actions could be the basis of relief.⁸ If, however, a plaintiff has alleged no facts in his or her complaint that, if true, would demonstrate that the defendants in a FTCA action were acting outside the scope of their employment, discovery is not warranted as to the issue of whether the defendants were acting within the scope of their employment.⁹

The validity of a claim of privilege by the United States as to a matter sought to be discovered in a case under the FTCA will be determined in the same manner as in any other case.¹⁰ The United States may be entitled to a protective order limiting the disclosure of confidential materials obtained from the government during discovery in a FTCA case, where the government shows good cause for the need to protect such materials and the opposing parties are given a mechanism for challenging the designation of confidentiality.¹¹

Observation:

A plaintiff in a FTCA action, having engaged in discovery, is properly denied additional discovery prior to the dismissal of the action for lack of subject matter jurisdiction where the plaintiff fails to articulate a discrete discovery request that might cure the jurisdictional deficiency and fails to otherwise specify where he or she might discover the necessary factual predicate for subject matter jurisdiction,¹² or in other words, fails to identify how the additional discovery would help the plaintiff to defeat the motion to dismiss the action.¹³

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Footnotes

¹ [Sutherland v. U.S.](#), 23 F.R.D. 247, 2 Fed. R. Serv. 2d 448 (E.D. N.Y. 1959).

² [Billingsley v. U.S.](#), 251 F.3d 696 (8th Cir. 2001).

³ [Wunderly v. U.S.](#), 8 F.R.D. 356 (E.D. Pa. 1948).

⁴ [Ignatiev v. U.S.](#), 238 F.3d 464 (D.C. Cir. 2001).

As to statutory exceptions to the applicability of the FTCA, generally, see [§ 192](#).

⁵ [Evans v. U.S.](#), 10 F.R.D. 255 (W.D. La. 1950).

⁶ [Gonzalez-Bernal v. U.S.](#), 907 F.2d 246 (1st Cir. 1990).

⁷ [Conlon v. U.S.](#), 474 F.3d 616 (9th Cir. 2007); [Bouchard v. U.S.](#), 241 F.R.D. 72 (D. Me. 2007).

⁸ [Tri-State Hosp. Supply Corp. v. U.S.](#), 226 F.R.D. 118 (D.D.C. 2005).

⁹ [Al-Zahrani v. Rumsfeld](#), 684 F. Supp. 2d 103 (D.D.C. 2010), aff'd on other grounds, 669 F.3d 315 (D.C. Cir. 2012).

¹⁰ [U.S. v. Reynolds](#), 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727, 32 A.L.R.2d 382 (1953).

¹¹ [Estate of Trentadue ex rel. Aguilar v. U.S.](#), 397 F.3d 840 (10th Cir. 2005).

¹² [Dichter-Mad Family Partners, LLP v. U.S.](#), 707 F. Supp. 2d 1016 (C.D. Cal. 2010), aff'd, 709 F.3d 749 (9th Cir. 2013).

¹³ [Northlight Harbor, LLC v. U.S.](#), 561 F. Supp. 2d 517 (D.N.J. 2008).

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§ 216. Jury trial in Federal Tort Claims Act action

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West's Key Number Digest

West's Key Number Digest, [United States](#) 971

In accordance with the statute¹ governing jury trial in actions against the United States, the plaintiff is not entitled to a jury trial in an action against the United States under the Federal Tort Claims Act (FTCA).² Some courts hold even the use of an advisory jury is precluded in a FTCA action,³ although other courts hold an advisory jury may be permitted⁴ so long as the court does not accept an advisory jury verdict which is contrary to the court's own conclusion.⁵

If, as a consequence of the United States being impleaded as a third-party defendant, there are both jury and nonjury issues in a FTCA action, the issues can be handled in a manner comparable to that used when issues of the law are tried to a jury and issues of an equitable nature in the same case are tried by the court alone, such as having a separate trial for jury and nonjury issues if the situation calls for a separation of the claims.⁶

If the United States files an action for damages to government property and the defendant files a counterclaim under the FTCA, the government is entitled to a trial by jury on its claim, even though the counterclaim is triable only by the court.⁷ If an action is brought against the United States under the FTCA and the United States asserts a claim against an alleged joint tortfeasor either directly or by way of cross-claim or impleader, the defendant against whom a claim is asserted by the United States has a right to a jury trial.⁸

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Footnotes

¹ 28 U.S.C.A. § 2402.

² *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980); *Nurse v. U.S.*, 226 F.3d 996 (9th Cir. 2000); *Engle v. Mecke*, 24 F.3d 133 (10th Cir. 1994); *Owen ex rel. Estate of O'Donnell v. U.S.*, 307 F. Supp. 2d 661 (E.D. Pa. 2004).

³ [Glasspool v. U.S.](#), 190 F. Supp. 804 (D. Del. 1961); [Honeycutt v. U.S.](#), 19 F.R.D. 229 (W.D. La. 1956).

⁴ [Hamm v. Nasatka Barriers Inc.](#), 166 F.R.D. 1 (D.D.C. 1996); [Schetter v. Housing Authority of City of Erie](#), 132 F. Supp. 149 (W.D. Pa. 1955).

⁵ [Wright v. U.S.](#), 80 F.R.D. 478 (D. Mont. 1978).

⁶ [U.S. v. Yellow Cab Co.](#), 340 U.S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951).

⁷ [U.S. v. Rosati](#), 97 F. Supp. 747 (D.N.J. 1951).

⁸ [Georges v. Hennessey](#), 545 F. Supp. 1264 (E.D. N.Y. 1982).

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§ 217. Burden of proof in Federal Tort Claims Act action

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West's Key Number Digest

West's Key Number Digest, [United States](#) 969(2)

In an action under the Federal Tort Claims Act (FTCA), the plaintiff has the burden of proving that subject matter jurisdiction exists,¹ and to demonstrate that the claim asserted is the kind permitted by statute² and that the conduct giving rise to the action occurred within the scope of the government employee's employment.³ The plaintiff's burden of proof in an action under the FTCA is the same as it is in any action for damages under state law generally, that is, to prove his or her case by a preponderance of the evidence.⁴ Circumstantial evidence may be used to meet the burden of proof,⁵ but proof based on conjecture and speculation is not sufficient to establish causation.⁶ A mere temporal relationship between the complained of action by the government and the plaintiff's injury also is not sufficient to establish causation.⁷

When a statutory exception to the government's waiver of sovereign immunity under the FTCA is at issue in a case, some courts hold that the plaintiff has the burden of proving that the statutory exception does not apply,⁸ while other courts hold that the United States has the burden of proving the applicability of a specific statutory exception.⁹

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¹ [Littell v. U.S.](#), 191 F. Supp. 2d 1338 (M.D. Fla. 2002); [Flanagan v. U.S.](#), 430 F. Supp. 2d 106 (W.D. N.Y. 2006).

² [Best v. U.S.](#), 522 F. Supp. 2d 252 (D.D.C. 2007).

³ [Kerns v. U.S.](#), 585 F.3d 187 (4th Cir. 2009); [Best v. U.S.](#), 522 F. Supp. 2d 252 (D.D.C. 2007).

⁴ [In re Swine Flu Immunization Products Liability Litigation](#), 533 F. Supp. 567 (D. Colo. 1980); [Appleton v. U.S.](#), 180 F. Supp. 2d 177 (D.D.C. 2002); [U.S. v. Krietemeyer](#), 506 F. Supp. 289 (S.D. Ill. 1980); [Hixenbaugh v. U.S.](#), 506 F. Supp. 461 (N.D. Ohio 1980).

Thompson v. U.S., 368 F. Supp. 466 (W.D. La. 1973).

¹⁰ In re Swine Flu Immunization Products Liability Litigation, 533 F. Supp. 581 (N.D. Okla. 1981).

In re Swine Flu Immunization Products Liability Litigation, 533 F. Supp. 586 (D. Colo. 1981).

Evans v. United States, 876 F.3d 375 (1st Cir. 2017); Blanco Ayala v. United States, 982 F.3d 209 (4th Cir. 2020); Indemnity Ins. Co. of North America v. U.S., 569 F.3d 175 (4th Cir. 2009); Garcia v. U.S. Air Force, 533 F.3d 1170 (10th Cir. 2008); Airplanes of Boca, Inc. v. U.S. ex rel. F.A.A., 254 F. Supp. 2d 1304 (S.D. Fla. 2003), aff'd, 112 Fed. Appx. 4 (11th Cir. 2004).

As to exceptions to the government's waiver of sovereign immunity under the FTCA, generally, see § 192.

Merando v. U.S., 517 F.3d 160 (3d Cir. 2008); Lam v. United States, 979 F.3d 665 (9th Cir. 2020); Terbush v. U.S., 516 F.3d 1125 (9th Cir. 2008).

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§ 218. Evidence in Federal Tort Claims Act action

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West's Key Number Digest

West's Key Number Digest, [United States](#) 969(1) to 969(3)

The disposition, by the United States Attorney General or other head of a federal agency, of a claim made under the Federal Tort Claims Act (FTCA) is not competent evidence of liability or of the amount of damages.¹ Furthermore, evidence that the United States owned the instrumentality that caused the damage for which recovery is sought is not enough to prove that the instrumentality, at the time of infliction of the damage, was being operated by a government employee in the scope of its office or employment.² The government's scope-of-employment certification, however, constitutes *prima facie* evidence that the individual defendants in a Federal Tort Claims Act (FTCA) action were acting within the scope of their employment.³

Practice Tip:

As long as the government's duty toward the plaintiff and the breach of that duty are established, there is no requirement that the plaintiff establish, by evidence, the particular official responsible for performance of the duty.⁴

¹ [28 U.S.C.A. § 2675\(c\)](#).

² Sawyer v. U.S., 148 F. Supp. 877 (M.D. Ga. 1956); Curtis v. US, 117 F. Supp. 912 (N.D. N.Y. 1953).

³ Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103 (D.D.C. 2010), aff'd on other grounds, 669 F.3d 315 (D.C. Cir. 2012).

⁴ Pierce v. U.S., 142 F. Supp. 721 (E.D. Tenn. 1955), judgment aff'd, 235 F.2d 466 (6th Cir. 1956).

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§ 219. Evidence in Federal Tort Claims Act action—Weight accorded expert testimony

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West's Key Number Digest

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In an action under the Federal Tort Claims Act (FTCA), the weight to be accorded expert testimony, even unrebutted expert testimony, is for the trier of fact to determine.¹ Conflicting expert medical opinions regarding the cause of injuries in a FTCA action raise an issue regarding the weight of each expert's testimony, and therefore the court, as the trier of fact, must resolve this issue.²

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Footnotes

¹ [Bradshaw v. U.S.](#), 443 F.2d 759 (D.C. Cir. 1971).

² [Shaver v. U.S.](#), 319 F. Supp. 2d 649 (M.D. N.C. 2004).

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§ 220. Compromise of claim in Federal Tort Claims Act action

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Forms

[Am. Jur. Legal Forms 2d § 113:12 \(Compromise and settlement of claim after action commenced—Motor vehicle accident\)](#)

After the commencement of an action on a claim under the Federal Tort Claims Act (FTCA), including an action removed from state court,¹ the United States Attorney General or a designee may arbitrate, compromise, or settle the claim.² No other procedure for compromise of matters under the FTCA is permissible.³ An Assistant United States Attorney does not have delegated authority to settle a claim, so that a purported settlement of a claim by such an officer is void, where the record shows no indication that he or she had supervisory authority over other Assistant United States Attorneys handling civil litigation.⁴

An oral settlement agreement of a plaintiff's action against the United States under the FTCA is not enforceable where the proposed settlement documents indicate that the parties did not intend to bind themselves to an agreement until the formal execution of the written settlement documents.⁵

A settlement under the FTCA is not proof of actual liability on the part of the government to the plaintiff, nor even *prima facie* proof of actual liability, but it is proof of potential liability and of the reasonableness of the settlement.⁶

Footnotes

¹ 28 U.S.C.A. § 2679(e).

² 28 U.S.C.A. § 2677.

³ U.S. v. Reilly, 385 F.2d 225 (10th Cir. 1967).

⁴ Bohlen v. U.S., 623 F. Supp. 595 (C.D. Ill. 1985).

⁵ Collick v. U.S., 552 F. Supp. 2d 349 (E.D. N.Y. 2008).

⁶ Blockston v. U.S., 278 F. Supp. 576 (D. Md. 1968).

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§ 221. Remedies in Federal Tort Claims Act action

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West's Key Number Digest

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Under the Federal Tort Claims Act (FTCA), an award is limited to compensatory¹ money damages² and must be for a lump sum.³ The components and measure of damages in a cause of action under the FTCA are taken from the law of the state where the alleged tort occurred,⁴ although the United States is not liable for interest prior to judgment, or for punitive damages.⁵ Damages which are not strictly limited to actual damages may be awarded under the FTCA, including those amounts which lie in a gray zone outside of ordinary notions of compensation, provided they are not damages awarded based on the culpability of a defendant's conduct.⁶

Jurisdiction under the FTCA does not submit the United States to liability for injunctive relief.⁷ An action may not be maintained under the FTCA for constructive trust relief,⁸ or to void an agreement between the United States and a private party,⁹ or to have a deed declared to be a mortgage, or to obtain an accounting, or to compel a reconveyance of real estate.¹⁰ The FTCA, however, permits equitable relief in an independent action based on assertions of fraud on the court committed in the course of a suit against the government for money damages.¹¹

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Footnotes

¹ [Fitch v. U.S.](#), 513 F.2d 1013, 30 A.L.R. Fed. 416 (6th Cir. 1975); [Abille v. U.S.](#), 482 F. Supp. 703 (N.D. Cal. 1980); [Santistevan v. U.S.](#), 610 F. Supp. 2d 1036 (D.S.D. 2009).

² [Christonson v. U.S.](#), 415 F. Supp. 2d 1186 (D. Idaho 2006); [General Mut. Ins. Co. v. U.S.](#), 119 F. Supp. 352 (N.D. N.Y. 1953); [Wham v. U.S.](#), 458 F. Supp. 147 (D.S.C. 1978).

³ [Frankel v. Heym](#), 466 F.2d 1226 (3d Cir. 1972).

4 Bravo v. U.S., 532 F.3d 1154 (11th Cir. 2008).

5 28 U.S.C.A. § 2674.

6 Beller v. U.S., 296 F. Supp. 2d 1277 (D.N.M. 2003).

7 Moon v. Takasaki, 501 F.2d 389 (9th Cir. 1974); Estate of Trentadue ex rel. Aguilar v. U.S., 397 F.3d 840 (10th Cir. 2005); Christonson v. U.S., 415 F. Supp. 2d 1186 (D. Idaho 2006).

8 General Mut. Ins. Co. v. U.S., 119 F. Supp. 352 (N.D. N.Y. 1953); U.S. v. Drinkwater, 434 F. Supp. 457 (E.D. Va. 1977).

9 Fitch v. U.S., 513 F.2d 1013, 30 A.L.R. Fed. 416 (6th Cir. 1975).

10 Graves v. Sneed, 541 F.2d 159 (6th Cir. 1976).

11 Weldon v. U.S., 70 F.3d 1 (2d Cir. 1995).

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VII. Actions Under Federal Tort Claims Act

E. Procedure in Federal District Court Actions

8. Resolution of Claim; Remedies and Attorney's Fees

§ 222. Interest on judgment in Federal Tort Claims Act action

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West's Key Number Digest

West's Key Number Digest, [United States](#) 970, 971

A plaintiff is entitled to the accrual of interest on a judgment entered against the United States in an action under the Federal Tort Claims Act when the judgment becomes final after review on appeal or petition by the United States.¹ Interest accrues from the date of filing of the transcript of the judgment of the district court with the United States Secretary of the Treasury, through the day before the date of the mandate of affirmance.² The burden is upon the plaintiff to file a transcript of the judgment with the Secretary of the Treasury as provided by law.³

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Footnotes

¹ [Dockery v. U.S.](#), 663 F. Supp. 2d 111 (N.D. N.Y. 2009).

² [Dickerson ex rel. Dickerson v. U.S.](#), 280 F.3d 470 (5th Cir. 2002).

³ [Reminga v. U.S.](#), 695 F.2d 1000 (6th Cir. 1982); [Rooney v. U.S.](#), 694 F.2d 582 (9th Cir. 1982).

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The Federal Tort Claims Act (FTCA) does not contain an express waiver of sovereign immunity necessary to permit the court to award attorney's fees against the United States directly under that Act;¹ nor may the necessary waiver of sovereign immunity with respect to cases sounding in tort be found in the Equal Access to Justice Act.² Attorney's fees are recoverable against the United States in a FTCA action, however, as damages, if the law of the place where the tort occurred so provides.³

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Footnotes

¹ [Anderson v. U.S.](#), 127 F.3d 1190 (9th Cir. 1997); [Joe v. U.S.](#), 772 F.2d 1535 (11th Cir. 1985); [U.S. v. Stein](#), 435 F. Supp. 2d 330 (S.D. N.Y. 2006), aff'd, [541 F.3d 130](#) (2d Cir. 2008).

² [Campbell v. U.S.](#), 835 F.2d 193 (9th Cir. 1987).

³ [Tri-State Hospital Supply Corp. v. U.S.](#), 341 F.3d 571 (D.C. Cir. 2003).

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§ 224. Attorney's fees in Federal Tort Claims Act action—Limitation on amount charged or received by attorney

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[Calculations of attorneys' fees under Federal Tort Claims Act—28 U.S.C.A. sec. 2678, 86 A.L.R. Fed. 866](#)

Under the Federal Tort Claims Act (FTCA), no attorney may charge, demand, receive, or collect a fee in excess of 25% of any judicial judgment or settlement.¹ This limitation on the amount of attorney's fees pertains to fees charged to a plaintiff by the plaintiff's own lawyer,² and relates to the fees an attorney may be allowed out of the amount recovered from the government, not to any costs awarded against the government in addition to the recovery,³ or any attorney's fee awards against the government arising out of the government's bad faith conduct.⁴

In setting an attorney's fees, a court may award less than the maximum fee allowed by statute.⁵ If there is a fee dispute between a successful plaintiff and its attorney, the dispute can be resolved by the court and there is no right to a trial by jury on the issue.⁶ The amount of fees, within the statutory limitations, however, is normally a matter for determination between the litigant and the litigant's attorney; a successful plaintiff has no automatic right to have attorney's fees set by the court, and if no special reason is stated for court involvement in the setting of fees the court may decline to do so.⁷

While the government has standing to challenge the amount of attorney's fees to be paid to the plaintiff's attorney,⁸ in the absence of any indication that the FTCA is being violated, a plaintiff and its attorney cannot be compelled to acknowledge in writing that their fee arrangement is in compliance with the law.⁹

In the case of a settlement, attorney's fees are to be calculated on the basis of the cost of the settlement package to the government, which is the equivalent of the actual present value of the total settlement to the claimant, excluding any speculative or intangible benefits.¹⁰

Caution:

Any attorney who charges, demands, receives, or collects for services rendered in connection with a FTCA claim any amount in excess of that allowed, if recovery be had, will be fined not more than \$2,000 or imprisoned not more than one year, or both.¹¹

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Footnotes

¹ 28 U.S.C.A. § 2678.

² *Stive v. U.S.*, 366 F.3d 520 (7th Cir. 2004); *Limone v. U.S.*, 815 F. Supp. 2d 393 (D. Mass. 2011).

³ *North Atlantic & Gulf S.S. Co. v. United States*, 209 F.2d 487 (2d Cir. 1954).

⁴ *Limone v. U.S.*, 815 F. Supp. 2d 393 (D. Mass. 2011).

⁵ *Pollard v. U.S.*, 69 F.R.D. 646 (M.D. Ala. 1976).

⁶ *Schwartz v. U.S.*, 381 F.2d 627 (3d Cir. 1967).

⁷ *Frazier v. U.S.*, 550 F. Supp. 203 (W.D. Okla. 1982).

⁸ *Wyatt v. U.S.*, 783 F.2d 45, 86 A.L.R. Fed. 855 (6th Cir. 1986).

⁹ *Moyer v. U.S.*, 612 F. Supp. 239 (D. Nev. 1985).

¹⁰ *Wyatt v. U.S.*, 783 F.2d 45, 86 A.L.R. Fed. 855 (6th Cir. 1986).

¹¹ 28 U.S.C.A. § 2678.